In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 235

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

[redacted]

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OCTOBER TERM, 1960

No. 235

FERRO, INC., and
BOLLING R. POWELL, JR.,
Petitioners

vs.

JOHN THOMPSON BEACON WINDOWS, LTD.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The District Court [1] held that the payment by an insolvent corporation of a debt owed to its managing officer-sole stockholder can be set aside at the suit of a third party creditor upon either of two independent grounds:

(1) A preference of an insider-creditor as against an outsider-creditor by an insolvent corporation is void-

[1] The opinion of the District Court appears at pp. 17-22 of the Joint Appendix filed in the Court of Appeals.

able at common law, being in violation of the fiduciary duty of a corporate officer to creditors. In so holding, the District Court, although deciding an issue previously undecided in the District of Columbia, followed the rule which is well established in thirty states in the United States. 2 Glenn, "Fraudulent Conveyances and Preferences" (Rev. Ed. 1940) § 386; 15A Fletcher, "Cyclopedia of the Law of Private Corporations" (1938 Ed.) §§ 7468-7471.

(2) The District Court found as a fact that the insider-creditor intended to hinder or delay the corporation's other creditor within the meaning of the District of Columbia Fraudulent Conveyance Act (D. C. Code, § 12-401) and that therefore the transfer of funds from the insolvent corporation to the insider was a fraudulent conveyance, void as against the outsider-creditor.

The Court of Appeals (Mr. Justice Reed and Edgerton and Bastian, J.J.), in a *per curiam* opinion, affirmed the judgment of the District Court on the ground that the District Court's finding of fact that the insider intended to hinder or delay the corporation's creditor was not clearly erroneous and that such finding supported the District Court's conclusion that the transfer was void as against the creditor under the Fraudulent Conveyance Act. The Court of Appeals subsequently denied a petition for rehearing.

The writ of certiorari should not be granted because the lower courts have merely decided an issue of local District of Columbia law. Furthermore, the result reached by the lower courts is in conformity with the present rule in thirty states, as well as with basic principles of equity and justice. After a full trial which included many exhibits and testimony by the insider-creditor (called by the plaintiff-respondent as a hostile witness) the District Court found as a fact that the in-

sider "certainly" intended to hinder or delay the creditor within the meaning of the Fraudulent Conveyance Act. In appealing the judgment to the Court of Appeals, the defendant-petitioner chose to include in the record on appeal only a few of the exhibits and no part of the transcript of oral testimony. On such record, it cannot be said that the District Court's finding of fact was "clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a).

The decision of the lower courts does not conflict with any decision of this court. Three of the cases cited in the petition [2] stand for no more than that a debtor may prefer one non-insider-creditor over another. The opinion of the District Court recognized this general rule but noted that the instant case involves a preference by an insolvent corporation of an insider-creditor over an outsider-creditor, which the courts have generally disapproved.[3] In the final case cited,[4] security was given by an insolvent corporation to an insider in return for fresh consideration. The Supreme Court expressly noted (p. 318) that the case did *not* involve a preference

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[2] Huntley v. Kingman and Co., 152 U.S. 527, 14 S. Ct. 688, 38 L. Ed. 540 (1894); Merillat v. Hensey, 221 U.S. 333, 31 S. Ct. 575, 55 L. Ed. 758 (1911); Davis v. Schwartz, 155 U.S. 631, 15 S. Ct. 237, 39 L. Ed. 289 (1895).

[3] The District Court opinion stated (J.A. 19): There are cases in this jurisdiction which hold the common law rule that a person or corporation may prefer creditors as long as the preference is not clearly fraudulent. Merrillat v. Hensey, 221 U.S. 333. These cases can be distinguished from the instant suit in that none of the cases involve the preference of a person who is the sole shareholder, sole controlling manager, and a director of the Corporation by the corporation he owns and controls.

[4] Sanford Fork and Tool Company v. Howe, Brown and Company, 157 U.S. 312, 15 S. Ct. 621, 39 L. Ed. 713 (1895).

by an insolvent corporation of an insider for past consideration only. The latter situation is the instant case.

Turning on particular facts, not in conflict with any other decision, and being a ruling as to local District of Columbia law, the decision below presents no question of general importance requiring review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,
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